

UTAH SCHOOL LAW UPDATE

Utah State Office of Education

November 2011

Inside this issue:

"DO I NEED AN ATTORNEY?" How Attorneys Participate in the Professional Practices Process



The Utah Professional Practices Advisory Commission procedures and administrative rules are more

similar to the tax code than they are to an episode of "Law and Order." There are multiple timelines, procedures, opportunities for discussion, and several boards, committees or panels that may contribute to resolving a complaint about teacher misconduct.

Let's begin with basic ideas:

- the Utah Professional Practices Advisory Commission (UPPAC) is authorized by Utah law (Section 53A-6-301).
- the rules and procedures for UPPAC action are outlined in administrative rule (UPPAC has rulemaking authority R686-100).
- the State Board of Education has sole authority to license educators and so has the final right to license educators or to take discipline (including suspension and revocation) against Utah educator licenses.
- UPPAC is an advisory committee to the State Board of Education. As such, the committee and Utah State Office of Education staff receive complaints against educators, investigate those complaints, hold administrative hearings, review background check information on new and

renewing educators and make lower-level findings in misconduct cases that do not result in license suspension, revocation or reinstatement.

 Licensing investigation and discipline are separate and distinct from employment action.

Back to "Do <u>I</u> need an attorney?" if there is an allegation of misconduct. The Utah law providing for UPPAC does not specifically require attorneys. UPPAC's administrative rule outlining procedures (R686-100) does not require, but allows for, educators to be represented by attorneys throughout the process. Both the UPPAC Executive Secretary who is responsible for overseeing the UPPAC procedures and the UPPAC investigator/prosecutor are attorneys. Also, many Utah educators, through their affiliation with UEA, are entitled to legal counsel provided by UEA-still other attorneys.

Consequently, if an educator accused of misconduct is represented by an attorney (or UEA), the UPPAC staff attorneys must communicate solely with the educator's attorney, consistent with legal ethics. This requirement may complicate the process—but it is required by legal ethics.

Having said this, Courts that have reviewed attorney involvement at all levels of educator employment and licensing discipline conclude that agencies can have preliminary discussions with accused teachers or licenseholders without attorneys present.

How do attorneys help their clients through the UPPAC process?

- An attorney can help coordinate and expedite the employment, criminal and UPPAC/licensing procedures

 if an educator has issues
 with all three systems.
- Usually counseling, an evaluation, a fingerprint background check and sometimes restitution are required to resolve all misconduct allegations. An attorney can help a client find an appropriate therapist, encourage the client to participate and complete counseling as required, assist with the reinstatement process and help the client satisfy reinstatement requirements.
- An attorney may be the most persuasive and articulate spokesperson for an educator throughout the process.

Let's consider one (slightly revised) example of an attorney who was helpful to her client and another attorney (also fictitious) who was **not** so helpful:

1. One attorney was helpful and responsive to her client and UPPAC when the attorney communicated to

(Continued on page 3)

Recent Education Cases	2
UPPAC Case of the Month	2
Your Questions	3



UPPAC CASES

The Utah State Board of Education revoked the educator license of Stephen T. Bentley. Mr. Bentley's license was originally suspended in 2006 for engaging in an inappropriate relationship with a student. UPPAC recommended and the Board agreed that Mr. Bentley's license should be revoked following a reinstatement hearing because Mr. Bentley violated the Stipulated Agreement that he signed with UPPAC in multiple ways and did not complete the requirements of the Agreement.

The Utah State Board of Education suspended the license of Cynthia Tangreen, an educator formerly employed by the Utah Schools for the Deaf and the Blind. The suspension results from Ms. Tangreen's failure to provide services to students consistent with their IEPs and for failing to keep appropriate documentation and submit reports to her supervisor.

Recent Education Case

In Monita Hara v. The Pennsylvania Department of Education, et al., 2011 WL 5238728 (M.D. Pa. November 1, 2011) the federal district court in Pennsylvania struck down an educator's right to speak out as a concerned citizen on an issue of public concern.

Monita Hara was the Superintendent of the Scranton State School for the Deaf (SSSD). Acting as a private citizen, writing from her own home and on her own time, Monita submitted an op-ed to the Scranton Times newspaper expressing her concern with the proposed closing of the SSSD. In the letter she appealed to the public to write letters to legislators and the governor to keep SSSD open. Three weeks later, the Director of the Bureau of Special Education and the Director of HR at the Department of Education met with Monita and discussed the article. At this time, they suspended Monita for 10 days without pay, and Monita chose to resign to avoid tarnishing her employment history and reputation with a baseless suspension.

Following the Supreme Court's holding that

"public employees do not surrender all their First Amendment rights by reason of their employment," the district court discussed whether Monita's speech was protected First Amendment speech. First, the court asked, was Monita speaking as a citizen on a matter of public concern? Neither party disputed that the issue was a matter of public concern, and because Monita wrote the article on her own time and from her home, the court was satisfied that she was acting as a citizen.

Next, they considered Monita's interest in addressing matters of public concern balanced against the state's interest in controlling its employees' words and actions. In so doing, the court considered "whether the statement impaire[d] discipline by superiors or harmony among co-workers, ha[d] a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impede[d] the performance of the speaker's duties or interefere[d] with the regular operation of the enterprise."

The court held that the letter did not impair discipline or harmony, but that Monita's sensitive leadership position within the hierarchy weighs firmly against her. Monita's "position as Superintendent of the SSSD placed her in square proximity with the upper echelons of the Department of Education, both in practice and in the eyes of the public, affording her a serious potential to arouse public controversy." Moreover, Monita's eminent position caused her to be relied upon to further policies in regard to SSSD and her actions cut directly

against this goal.

Because Monita's interest in free speech was outweighed

by the public employer's interest in controlling employee speech, the court found that Monita's speech was **not protected**.

UPPAC Case of the Month

"Statute of limitations" is a legal term that means a statute prescribing a period of limitation for the bringing of certain kinds of legal action. In the law, this means if you have a beef with someone and want to sue, you'd better do it sooner rather than later, or at least in the time limit prescribed by law, or your chance to see justice prevail may be lost. The same is true in the criminal world. If a person committed a crime long, long ago, the State may be barred from prosecuting the action if the statute of limitations has run.

Administratively, however, there is no statute of limitations. Disciplinary action on a educator's license is not subject to a 5 year, or a 10 year rule. While the time that has passed since the ethical violation may be a mitigating factor in UPPAC's decision, behavior that is truly egregious is not dismissed simply because it happened in the past. This is true even if the educator has had a stellar career—except

for an egregious act that occurred at the very beginning of the educator's career.

While not common, UPPAC has dealt with a handful of cases involving seriously unethical conduct that occurred more than 10 years ago. In all instances, UPPAC has recommended and the State Board of Education has taken disciplinary action. All cases involved sexual relations with a student. In one instance, the educator was disciplined when a former student's current husband reported a situation between the former student and her teacher 12 years previously. This educator's license was suspended for 2.5 years, despite the multiple awards and accolades this educator had received over the years. On another occasion an educator admitted to sexual relations with a student 25 years in the past. This educator's license was suspended for 4

years. Another teacher admitted sexual intimacy with a former student, now 48 years old. The length and depth of that relationship was disputed but the educator admitted to having several sexual encounters with the former student, and as a result, this educator's license was suspended, even though the educator had an unblemished record and remarkable career for 30 years.

Each of these educators also felt that he was being unfairly punished by UPPAC and that he had paid his dues to society, to religion, and to himself. While UPPAC applauds and commends the redemptive educator, redemption does not immunize the educator from professional action or from professional consequences in addition to personal or moral consequences.

Utah State Office of Education Page 2

"Do I Need an Attorney" (cont.)

(Continued from page 1)

client that she needed a psychological evaluation per an agreement signed by the educator. Client had a letter from her therapist, but not an "evaluation." Attorney facilitated educator's and therapist's completion of a more formal psychological evaluation prior to a reinstatement hearing.

2. Another attorney represented a client/ educator in both a criminal trial (which concluded with a plea in abeyance) and the UPPAC administrative process. The attorney failed for months to communicate with UPPAC—despite many emails and telephone calls asking for attorney's response. At the criminal trial where educator admitted his misconduct, attorney made a personal statement misrepresenting UPPAC procedures and blaming UPPAC for client's tarnished reputation. Attorney continued to ignore UPPAC contacts. The attorney's lying, lack of understanding and failure to

respond caused educator's license suspension to span three school years instead of a possible two school years.

So, in deciding whether or not to retain an attorney following allegations of misconduct, consider the following:

- 1. Is your attorney familiar with administrative procedures and how they may differ from courtroom procedures?
- 2. Does your attorney understand that delaying criminal matters may be strategically helpful to you? In fact, delay tactics or "failure to communicate" usually results in suspensions spanning more school years than necessary.
- 3. Does your attorney have time to address your case, return phone calls and emails in a timely way, and arrange meetings?
- 4. Does your attorney understand that your license, and therefore your career, are at stake?
- Does your attorney know anything about public education—or professional

standards for teachers?

6. Is your attorney willing to listen to what you want and know about education in the matter, instead of pushing his own agenda?

If you can answer "yes" to all these questions, an attorney may be very helpful to you in the process. If not, an attorney will only hurt your case.

"An attorney may be the most persuasive and articulate spokesperson for an educator throughout the process."

Your Questions

Q: I have heard about a "10 day rule" that allows schools to "drop" students if they miss 10 or more school days or class periods in a row? Is this accurate?

A: A State Board of Education Rule, 277-419 Pupil Accounting provides that both school districts and charter schools cannot count students for purposes of funding once the student misses 10 consecutive school days or 10 consecutive class periods. The school district/charter school, of course, begins to count the student for funding purposes again when the student returns to school or class. The "10 day rule" should not be used to "unenroll" students. It sends a funding message to the State Board of Education as the Board provides continuous state funding to school districts/charter schools. Traditional schools allow students to return to school (consistent with residency and age requirements) even after considerable absences. Charter schools should do the same unless the charter school can justify suspending a student for truancy

What do you do when...?

problems.

Q: I am a 5th grade teacher who teaches piano lessons. I would like to advertise my availability to the students in my class. Is that ethically appropriate?

A: You can advertise your willingness to teach piano using any resources that the school offers to members of the community who request to advertise services—a school bullet.

request to advertise services—a school bulletin board (old-fashioned or electronic), a PTA newsletter, a local newspaper. You cannot use school directories or class lists to solicit students. You should not offer the lessons to your students or to parents

at parent meetings or back to school nights. You, of course, should not use school equipment or premises for your meetings or your lessons.

Q: I am a high school history teacher. I would like to take my students to Washington D.C. for a "history experience" this summer. Can I do this as a charter school teacher?

A: If the charter school sponsors the trip, all students who are interested and who meet the requirements for the experience must be allowed to participate. If a student qualifies for fee waivers, that student's expenses must be waived because the trip is sponsored by a public school. School insurance would cover all participants for the experience. If you do not want to cover fee waivereligible students or if you cannot afford to pay their expenses, the trip must be privately sponsored. A group of parents

(Continued on page 4)

Utah State Office of Education Page 3

Utah State Office of Education 250 East 500 South P.O. Box 144200 Salt Lake City, Utah 84114-4200

Phone: 801-538-7832 Fax: 801-538-7768

Email: heidi.alder@schools.utah.gov





The Utah Professional Practices Advisory Commission, as an advisory commission to the Utah State Board of Education, sets standards of professional performance, competence and ethical conduct for persons holding licenses issued by the Board.

The Government and Legislative Relations Section at the Utah State Office of provides information, direction and support to school districts, other state agencies, teachers and the general public on current legal issues, public education law, educator discipline, professional standards, and legislation.

Our website also provides information such as Board and UPPAC rules, model forms, reporting forms for alleged educator misconduct, curriculum guides, licensing information, NCLB information, statistical information about Utah schools and districts and links to each department at the state office.

Your Questions (Cont.)

(Continued from page 3)
could organize and sponsor the trip.
You could participate, but not as a
school employee. You should not
promote the trip to the students at your
school and you should not collect money
or make trip arrangements—except
strictly as a private individual. Of
course, the experience would not be
covered by school liability insurance. In
fact, you and parent organizers should be
very careful to explain that the trip is
privately sponsored so that the school
would not be responsible for accidents or
mishaps—or expenses—of the trip.

Q: I am a high school civics, history and government teacher. I would like to participate in the current discussion about the United States as a "republic," a "representative democracy," or a "compound republic," but I don't want to contradict the school district position. Can I express my opinion?

A: Public employees do not lose their

First Amendment rights. You can speak on areas of "public concern." You can also provide (respectfully, please!) your expert opinion as a history/government teacher. There are recent U.S. Supreme Court cases that caution public employees about contradicting their employers-even if the employee is "more right." Providing factual information in the public market place of ideas and expressing an opinion in areas of public concern are (still) Constitutional rights. But, as another article in this Newsletter addresses, the sensitivity and stature of your employment position may affect those rights.

Q: I have a temporary teaching assignment while the regular teacher has been called up on active military duty in the Marines. I am receiving confusing information about my future employment. Does Utah law require a public employer to hold a position for someone on active military duty?

A: Utah law requires that any "employer" (not just public schools or public employers) grant a leave of absence to a military reservist called up to active duty. The employee must be allowed a leave of absence for up to five years and she must be allowed to return to her "prior employment with the seniority, status, pay and vacation" the employee would have had if she had not been called up. The employer is guilty of a class B misdemeanor if it does not offer this benefit to a reservist.

Utah State Office of Education